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No. 91-6382

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT WAYNE SAWYER,

Petitioner,

vs.

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Under what standard may a death sentence be a "fundamental miscarriage of justice" under *Murray* v. *Carrier*, 477 U. S. 478 (1986)?

2. Is the proper standard determined by the petitioner's eligibility for the death penalty or by reexamining the "accuracy" of his sentence?

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Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970) 5, 7, 20

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U. S. Bureau of Justice Statistics, *Capital Punishment 1990* 23

U. S. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1988* 23

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of the legality of a proceeding conducted many years ago, involving no substantial question of whether petitioner is actually guilty.

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1. CJLF has written consent of the parties to file this brief.

Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On September 29, 1979, defendant and Charles Lane tortured to death Frances Arwood. The killers repeatedly beat her, scalded her with boiling water, dunked her in a bathtub, and, according to the testimony at the penalty phase, defendant "poured lighter fluid on the unconscious victim, particularly her torso and genital area, and set the lighter fluid afire." *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 203, 110 S. Ct. 2822, 2825 (1990). Defendant "told Lane that he had done this to show 'just how cruel he could be.' " *Ibid.*

On September 19, 1980, defendant was convicted and sentenced to death. His current claims were not made until the second round of habeas petitions. These claims have been rejected by the district court and the court of appeals. Pet. 3-5.

SUMMARY OF ARGUMENT

The fundamental miscarriage of justice exception to the cause and prejudice test must remain an exception and not the rule. If the exception is interpreted too broadly or subjectively, it would overwhelm the federal courts in a flood of successive petitions, and violate the integrity and the finality of state judgments.

A death penalty can be a fundamental miscarriage of justice only if defendant was not eligible for the death sentence. Eligibility is reserved for those who have committed murder with at least one statutory aggravating circumstance and whose status does not otherwise render them ineligible for the death penalty. Eligibility for the death penalty can be determined by narrow, objective criteria, thus ensuring that a fundamental miscarriage of justice remains the exception and not the rule.

While narrow and objective, the eligibility test is still fair. It preserves those rights most fundamental to the death sentencing scheme. The method for determining eligibility for the death penalty, requiring a finding of at least one statutory aggravating factor, serves the primary interests that motivated this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972). Preserving the status-based exemptions prevents barbarous executions from being carried out.

Defendant's alternative, by addressing the accuracy of the sentencer's finding in light of the alleged errors is fatally subjective. The sentencer is given broad access to evidence and substantial discretion to impose the death sentence. Any attempt to gauge the accuracy of the weighing of aggravating and mitigating circumstances is no more than speculation. This will in turn lead to an excessively individual interpretation of the Constitution, massive delay, and a standard too loose to protect the state's interest against successive petitions.

ARGUMENT

I. In the Penalty Phase, Fundamental Miscarriage of Justice Occurs Only When the Sentencer Cannot Legally Impose the Death Penalty.

"Justice is the end of government. It is the end of civil society. It has been and even will be pursued until it has been obtained, or until liberty be lost in the pursuit." *The Federalist No. 51*, at 324 (Madison) (Rossiter ed. 1961).

To achieve this goal, we have established an elaborate system of checks on government power. This is most evident in the criminal law. The accused criminal is entitled to an impressive variety of rights. See *Duncan* v. *Louisiana*, 391 U. S. 145, 148 (1968). The protections built into our criminal justice system help insure that the accused will be treated unjustly only in the rarest of circumstances. Cf. 4 W. Blackstone, *Commentaries* *352.

"But justice, though due to the accused, is due to the accuser also." *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934). It has been over 12 years since defendant and his accomplice murdered Frances Arwood and over 11 years since his conviction. No court that has addressed the substance of his claims has accepted them. See Pet. 3-5. Yet his sentence has not been executed. This delay is the only miscarriage of justice in the present case. Accepting defendant's argument would only compound this miscarriage and eviscerate the finality of state convictions. Justice demands rejecting his arguments.

A. The Exception.

When evaluating defendant's claims, the single most important issue to keep in mind is that they either were or should have been litigated in his first round of habeas corpus. The general rule is that successive petitions must be dismissed. See Rules Governing Section 2254 Cases in the United States District Courts, Rule 9(b). To preserve the rule against abusive or successive claims, any exceptions truly must be *exceptions*.

"Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 543, 111 S. Ct. 1454, 1469 (1991). This is not a new problem. Since the genesis of modern habeas corpus, the fear of overwhelming the federal judiciary with habeas claims has been present. See *Brown* v. *Allen*, 344 U. S. 443, 536, n. 8 (1953) (Jackson, J., dissenting). This problem has only gotten worse since Justice Jackson's prophecy.

States bear an even heavier burden. They must bear the financial burden of defending their convictions in federal court. More importantly, habeas corpus attacks the integrity of a state's criminal justice system. Collateral attack in federal courts frustrates " 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.' " *Murray* v. *Carrier*, 477 U. S. 478, 487 (1986) (quoting *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982)). Perhaps the greatest burden habeas places upon a state is the lack of finality. If a prisoner is allowed unlimited attacks upon his conviction, then it never truly becomes final. "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague* v. *Lane*, 489 U. S. 288, 309 (1989) (plurality). The delay inherent in habeas corpus adds another cost to the state. Retrial after a successful petition is at best difficult because of the usually long delay between conviction and successful habeas attack. "[W]hen a habeas petitioner succeeds in obtaining a new trial, the 'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time," prejudice the government and diminish the chances of a reliable criminal adjudication. *McCleskey*, *supra*, 113 L. Ed. 2d, at 542, 111 S. Ct., at 1468 (quoting *Kuhlmann* v. *Wilson*, 477 U. S. 436, 453 (1986) (plurality)). The cost of delay is particularly great in capital cases, as execution of the sentence cannot begin until the end of the proceedings is reached. See *Barefoot* v. *Estelle*, 463 U. S. 880, 888 (1983).

The bar against successive petitions is a guardian of these interests. If prisoners were allowed unlimited collateral attacks upon their convictions, the federal courts could grind to a halt, snowed in under a blizzard of worthless petitions. So long as they are permitted, a prisoner has nothing to lose by making multiple petitions—he has nothing better to do and he always has a chance to win. See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 150 (1970).

The cost of unlimited petitions is even greater for the state. If there was no control over successive petitions, then no state conviction could be considered final. Placing state convictions under perpetual federal review blocks the states' efforts to punish offenders. *Carrier*, *supra*, 477 U. S., at 487. "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a state to pass laws means little if the state cannot enforce them." *McCleskey*, *supra*, 113 L. Ed. 2d, at 543, 111 S. Ct., at 1469.

As befits such an important rule, this doctrine has only two narrow exceptions. If there is cause for not raising a claim in a

prior petition and resulting prejudice, then the claim may be heard. See *McCleskey*, *supra*, 113 L. Ed. 2d, at 545, 111 S. Ct., at 1470-1471. This is a difficult standard to meet. To meet this test, any error must have "worked to [petitioner's] *actual and substantial* disadvantage, infecting his entire trial with error of constitutional dimensions." *United States* v. *Frady*, 456 U. S. 152, 170 (1982) (emphasis added). Showing cause is similarly difficult. Ineffective assistance of habeas counsel does not establish cause. See *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 670, 111 S. Ct. 2546, 2566 (1991). Something of a higher order, such as the interference of state officials or the creation of a new ground for relief subsequent to the first petition, is needed to give sufficient cause. See *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986).[2]

If petitioner cannot overcome this high hurdle, the only other exception is to prove that the error he wants reversed caused him a fundamental miscarriage of justice. See *McCleskey*, *supra*, 113 L. Ed. 2d, at 545, 111 S. Ct., at 1470. A successive petitioner who seeks to invoke this exception has already received more process than is due. He has already been convicted, the state court has affirmed his conviction on direct and collateral review, and his first habeas petition in the district court and the court of appeals has been found meritless. He now wants a federal court to take on yet another habeas petition and thwart the state's interest in finality to hear a claim that should have been made in the first petition. To justify another round of litigation, such a claim must involve matters of the utmost gravity.

This Court has recognized that a fundamental miscarriage of justice is the rarest of exceptions. The parameters to this exception were first recognized by a majority of this Court in

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2. In *Reed* v. *Ross*, 468 U. S. 1, 15 (1984), this Court found that cause could exist for novel claims. However, *Teague* v. *Lane*, *supra*, by limiting the retroactivity of new constitutional rules on habeas corpus, effectively eliminates this form of cause. See *Hopkinson* v. *Shillinger*, 888 F. 2d 1286, 1288-1289 (CA10 1989).

Murray v. *Carrier*, 477 U. S. 478, 481-482 (1986), where petitioner attempted to overturn his rape conviction on federal habeas corpus through a procedurally defaulted claim. The *Carrier* Court here recognized one last possibility if petitioner could not show cause and prejudice.

> "Accordingly, we think that *in an extraordinary case*, where a constitutional violation has probably resulted in the conviction of one who is *actually innocent*, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Id.*, at 496 (emphasis added).

This exception has never been given a more precise definition by this Court. Nonetheless, one theme has remained consistent throughout this Court's analysis of this exception. This innocence exception is rare, and shall be granted only in the most extraordinary circumstances. See *Dugger* v. *Adams*, 489 U. S. 401, 411, n. 6 (1989); *Smith* v. *Murray*, 477 U. S. 527, 537 (1986); *McCleskey*, *supra*, 113 L. Ed. 2d, at 550, 111 S. Ct., at 1474-1475; *Kuhlmann*, *supra*, 477 U. S., at 454.

The rarity of this exception reflects both the need to limit successive petitions and the reality that few such petitions involve a truly fundamental miscarriage of justice. Our system is designed to protect the accused from an unjust conviction. It is the extremely rare case that makes it through all the hurdles to get to a successive habeas petition and involve a fundamental miscarriage of justice.[3]

The prohibition against successive petitions plays a key role in preventing the federal courts from perpetually reviewing

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3. One of the most respected federal judges estimated that in 11 years on the bench he had seen at most half a dozen cases where he "entertained a real doubt about a defendant's guilt." Friendly, *supra*, 38 U. Chi. L. Rev., at 160, n. 94.

state convictions.[4] If, however, the injustice exception is given too broad a definition, it would swallow the general rule against successive petitions. This Court has recognized this threat and thus has proceeded with due caution in interpreting this exception. See *Adams*, *supra*, 489 U. S., at 411, n. 6. "We adopt this standard [fundamental miscarriage of justice] now to effectuate the clear intent of *Congress* that successive federal habeas review should be granted only in *rare* cases." *Kuhlmann*, *supra*, 477 U. S., at 454 (emphasis added) (plurality). Therefore, any definition of the standard enunciated in *Carrier* must be narrowly drawn to prevent the injustice that would follow from too many successive petitions. Allowing a successive petition under the fundamental miscarriage of justice standard must be the *exception* and not the rule.

B. The Need for a Standard.

This case comes to this Court because of the difficulty of reconciling innocence with the death penalty. Attacking the justice of a death sentence concedes defendant's guilt of the murder.[5] Innocence is defined as "[t]he absence of guilt." Black's Law Dictionary 708 (5th ed. 1979). This Court has recognized the incongruity of the concept of innocence of the death penalty. "We acknowledge that the concept of 'actual,' as distinct from 'legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial of a capital offense." *Smith* v. *Murray*, 477 U. S. 527, 537 (1986). The difficulty of reconciling innocence and the death penalty has also bedeviled the circuit courts. See *Johnson* v. *Singletary*, 938 F. 2d 1166, 1176 (CA11 1991) (en banc).

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4. The cause and prejudice standard is also used to excuse procedural default in habeas cases. See *Carrier*, *supra*, 477 U. S., at 487. Therefore, any definition of what constitutes a fundamental miscarriage of justice will also affect this important doctrine.

5. It would be possible to attack in the alternative the injustice of the underlying conviction and that of the penalty. Any attack on the penalty, however, presumes that any attack based upon innocence of the crime has failed.

The better way to address this problem is by returning to the roots of the innocence exception. The innocence exception came from the principle that " '[i]n appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Murray* v. *Carrier*, 477 U. S. 478, 495 (1986) (quoting *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982)).

While it is difficult to comprehend a person being guilty of a crime and innocent of a sentence, it is possible to understand a guilty person's sentence as being a fundamental miscarriage of justice. The inherent subjectivity of "injustice," however, calls for caution.

> " '[I]t is important, in order to preclude individualized enforcement of the Constitution in different parts of the Nation, to lay down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State Courts.' " *McCleskey*, *supra*, 113 L. Ed. 2d, at 546, 111 S. Ct., at 1471 (quoting *Brown* v. *Allen*, 344 U. S. 443, 501-502 (1953) (opinion of Frankfurter, J.)).

This Court must provide the lower federal courts with some rule to guide their discretion in determining what is a fundamental miscarriage of justice. It is not enough to say, "I know it when I see it." See *Jacobellis* v. *Ohio*, 378 U. S. 184, 197 (1964) (Stewart, J., concurring). We need "a sound and workable means of channeling the discretion of federal habeas courts." *Carrier*, *supra*, 477 U. S., at 497. In order to establish a standard for when penalty phase error is fundamentally unjust, it will be necessary to examine how the penalty phase operates and its purpose. Once the penalty phase is understood, a standard of justice may be developed.

C. The Death Penalty.

Before *Furman* v. *Georgia*, 408 U. S. 238 (1972), the death penalty was subject to little more constitutional regulation than any other aspect of criminal procedure. In most states, no more than a first degree murder conviction was needed to impose capital punishment. See *McGautha* v. *California*, 402 U. S. 183, 198 (1971). Some states allowed lesser crimes to be punished by death. See, *e.g.*, *Powell* v. *Alabama*, 287 U. S. 45, 50 (1932). One reform that had been adopted to mitigate harshness in the system was to allow the jury to determine whether the sentence would be death or life imprisonment. *McGautha*, *supra*, 482 U. S., at 200. This Court had approved giving the jury unfettered and absolute discretion in sentencing. *Andres* v. *United States*, 333 U. S. 740 (1948).

This world was swept away with this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972). *Furman* found that there was something wrong with the nation's death penalty system, but neither explained what exactly was wrong or how to remedy it. While five justices agreed to vacate the sentences, none could agree on the reasons. Two Justices would have abolished capital punishment. *Furman*, *supra*, 408 U. S., at 305 (Brennan, J., concurring); *id.*, at 369 (Marshall, J., concurring). Two opinions expressed the belief that the penalty was imposed rarely and the statutes in question provided no principled means for determining who should and should not receive the death sentence. *Id.*, at 309-310 (Stewart, J., concurring); *id.*, at 311-12 (White, J., concurring). Justice Stewart indicated that a mandatory sentencing scheme that eliminated jury discretion would pass constitutional muster. *Id.*, at 307-308 (Stewart, J., concurring). One Justice felt that the death penalty was imposed in a discriminatory manner. *Id.*, at 242-243 (Douglas, J., concurring).

The state legislatures reacted quickly to this legal firestorm. Unfortunately, without a majority opinion, they had no guidance for their reforms. Some states chose to eliminate the jury's discretion to sentence, while others chose guided discretion statutes that defined certain aggravating and mitigating standards. See *Johnson*, *supra*, 938 F. 2d, at 1179; Scheidegger, *Capital Punishment in 1987: The Puzzle Nears Completion*, 15 W. St. L. Rev. 95, 107-108 (1987).

This Court chose guided discretion. In order to placate the fears voiced by Justices White and Stewart in *Furman*, some guidance had to be given to the jury in order to prevent the death penalty from being arbitrarily imposed. "*Furman* mandates, . . . that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (plurality).

While guidance was necessary, it was not total. A discretionless death penalty was seen as encouraging widespread jury nullification, *Woodson* v. *North Carolina*, 428 U. S. 280, 291-296 (1976) (plurality), and had been chosen only due to a misplaced reliance on *Furman*, *Woodson*, *supra*, at 298-299. Most importantly, the *Woodson* Court came to the previously unknown realization that individualized consideration of each death sentence was a "constitutional imperative." In addition to examining the crime, the jury must also look to "the character and record of the individual offender." See *id.*, at 303-305.

Gregg and *Woodson* and the cases interpreting them have become the Scylla and Charybdis of capital punishment. A death sentence is valid only if the state limits the sentencer's discretion, but not so much as to infringe upon the newly invented constitutional imperative of *Woodson*.

These two lines of authority protect different interests in different ways. The guidance requirement of *Gregg* is concrete. One constant in this Court's post-*Furman* death penalty jurisprudence has been the need to limit the sentencer's discretion. See *Walton* v. *Arizona*, 111 L. Ed. 2d 511, 532-533, 110 S. Ct. 3047, 3060-3061 (1991) (Scalia, J., concurring). The standard established is relatively straightforward for the states to follow and for the courts to administer. States must provide the sentencer with " 'clear and objective standards' that 'make rationally reviewable the process for imposing a sentence of death.' " *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (footnotes omitted). The ease of complying with this is demon-

strated by the fact that since *Furman* this Court has reversed a death sentence for excessive discretion only twice. See *Walton*, *supra*, 111 L. Ed. 2d, at 533, 110 S. Ct., at 3061 (Scalia, J., concurring).[6]

The fact that the states have been able to follow the guidance standard does not undermine its importance. The guidance requirement evolved as a means with dealing with the problems of arbitrariness that so heavily influences the *Furman* decision. A jury can no longer impose the death penalty at its whim. It must now find a reason to separate defendant from those murderers for whom death is not warranted. It must do so pursuant to standards established by the state that provide clear and specific guidance. See *Godfrey*, *supra*, 446 U. S., at 428. There is little wonder that this Court considers the need for a guidance to be a "fundamental constitutional requirement." *Maynard* v. *Cartwright*, 486 U. S. 356, 362 (1988).

The individual sentencing requirement developed in *Woodson* is a very different sort of right. The quest to make each death sentence individual has moved the death penalty towards its pre-*Furman* state. The sentencer can "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (emphasis in original) (plurality); see *Sumner* v. *Shuman*, 483 U. S. 66, 75-76 (1987). The sentencer "may not be precluded from giving effect to all mitigating evidence." See *McKoy* v. *North Carolina*, 108 L. Ed. 2d 369, 377-378, 110 S. Ct. 1227, 1230-1231 (1990).

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6. The *Walton* concurrence cites *Maynard* v. *Cartwright*, 486 U. S. 356, 362-364 (1988) and *Godfrey*, *supra*, 446 U. S., at 428-429 as the two reversals by this Court due to excessive discretion. *Walton*, *supra*, 111 L. Ed. 2d, at 533, 110 S. Ct., at 3061. It is arguable that this Court reversed a third death penalty for excessive discretion in *Clemont* v. *Mississippi*, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990).

Guided discretion and individual sentencing are not the only limits this Court has placed on capital punishment. Only certain people who have committed certain crimes may be sentenced to death. Thus a rape conviction may not serve as the basis for a death sentence. *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality). Minor participation in a felony underlying felony murder, barring a finding that defendant exhibited a reckless disregard for life, will not support capital punishment. *Tison* v. *Arizona*, 481 U. S. 137, 157-158 (1987). It is also probable that persons under 16 may not be sentenced to death unless the Legislature clearly sets out a lower minimum age. See *Thompson* v. *Oklahoma*, 487 U. S. 815, 857-858 (1988) (O'Connor, J., concurring). A person may not be executed so long as he is insane, *Ford* v. *Wainwright*, 477 U. S. 399, 408 (1986), nor is it likely that the severely or profoundly retarded may be executed, see *Penry* v. *Lynaugh*, 492 U. S. 302, 333 (1989).

These rights accrue to the defendant not because of a particular need to manage the death penalty process, but because of the fundamental injustice of executing a person who fits one of these particular exceptions. In these cases, death is inappropriate because "the objective indicia of community values have demonstrated a consensus that the death penalty is disproportionate as applied to a certain class of cases . . . ." *McCleskey* v. *Kemp*, 481 U. S. 279, 305 (1987).

Current death penalty law may be summarized as thus: A person may not be sentenced to death unless convicted of murder[7] and unless the class of death-eligible murders is somehow objectively narrowed. This is typically done by finding at least one statutory aggravating circumstance. Once defendant is convicted of this crime, the sentencer has broad discretion, being able to hear any mitigating evidence. This discretion is broadened by the fact that the jury may also hear aggravating evidence beyond the statutory aggravating circum-

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7. At least among the common crimes murder is the only capital offense. But see 18 U. S. C. § 794 (espionage); *id.*, § 2381 (treason).

stances. See *Barclay* v. *Florida*, 463 U. S. 939, 947 (1983). The sentencer then weighs the aggravating and mitigating facts and decides whether death or life imprisonment is appropriate. These roles and functions are important to determining what penalty phase error constitutes a fundamental miscarriage of justice.

D. The Eligibility Standard.

What constitutes a fundamental miscarriage of justice in the penalty phase can be determined only after applying several important principles. Whatever standard is enunciated, it must insure that the innocence exception remains an exception. Making the exception too broad would swallow up the rule against successive petitions, causing considerable harm to the state and the federal judiciary. See *ante*, at 4-8. Therefore, any rule enunciated by this Court must be sufficiently narrow to preserve the prohibition against successive petitions.

In addition to being narrow, the standard must also be workable.

> "A workable definition [of the miscarriage of justice exception] is essential to our jurisprudence because we are often faced with procedurally-defaulted claims, and many petitioners claim they meet this exception. It is crucial that we know when to apply the second exception, so as to limit our interference with the states' criminal justice systems and promote finality while simultaneously recognizing the truly extraordinary case in which a petitioner's claim must be reviewed . . . in order to avoid a fundamental miscarriage of justice." *Johnson*, *supra*, 938 F. 2d, at 1176.

The state and the federal courts are not the only ones protected by a narrow, workable standard. The truly deserving claimants are best served by the highest, most objective standard reasonable. If the standard is perceived as being too broad, then the federal courts will become flooded with successive petitions proclaiming the injustice of each petitioner's death sentence. "It must prejudice the occasional meritorious

application to be buried in a flood of worthless ones." *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring in the judgment). Opening the doors too wide risks getting some of the few truly worthy petitions lost in the ensuing stampede.

These concerns were paramount in this Court's decision to adopt the cause and prejudice standard for successive petitions in *McCleskey*. "Considerations of certainty and stability in our discharge of the judicial function . . . " led to the adoption of the cause and prejudice standard. See *McCleskey*, 113 L. Ed. 2d, at 546, 111 S. Ct., at 1471. It was well-defined, objective, and provided " 'a sound and workable means of channeling the discretion of federal habeas courts.' " *Id.*, 113 L. Ed. 2d, at 546, 111 S. Ct., at 1471 (quoting *Carrier*, *supra*, 477 U. S., at 497). It also was prone to uniform application. *Id.*, 113 L. Ed. 2d, at 546, 111 S. Ct., at 1471. Finally, this Court adopted the cause and prejudice standard in order to "curtail the abusive petitions that in recent years have threatened to undermine the integrity of the habeas corpus process." *Id.*, 113 L. Ed. 2d, at 546, 111 S. Ct., at 1471.

Any standard enunciated for the sole exception to the cause and prejudice test must guard these same interests. If it does not discourage successive petitions, if it is not objective, if it cannot be applied uniformly by the federal courts, then the cause and prejudice standard will fail in its purpose. This will turn the prohibitions against procedurally defaulted claims and successive petitions into empty husks.

A standard for determining whether a penalty phase error is a fundamental miscarriage of justice that comports with the principles of *McCleskey* and has been developed. In order for penalty phase error to constitute a fundamental miscarriage of justice, it must go to the authority of the sentencer to impose the death penalty. "In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is *ineligible* for the death penalty." *Johnson*, *supra*, 938 F. 2d, at 1183 (emphasis in original). This standard, formulated by the Eleventh Circuit in *Johnson* and adopted by the Fifth Circuit in the present case, *Sawyer* v. *Whitley*, 945 F. 2d 812,

820 (CA5 1991), provides an objective and understandable standard that limits successive petitions yet preserves the fundamental rights in the penalty phase.

A defendant must have three findings made against him before being sentenced to death. First, he must be convicted of murder. Second, the finder of fact must determine that some narrowing fact is true. Third, the sentencer must weigh all mitigating and aggravating evidence and decide the appropriate sentence.[8]

Of the three findings, the first goes to the actual innocence of the crime, whether the defendant actually committed the murder. The eligibility standard for miscarriage of justice addresses the second finding made in the capital punishment process. A person *may not* be executed unless the sentencer's discretion is limited. The method used to limit this discretion is to require a finding that the murder was statutorily aggravated. See *Maynard* v. *Cartwright*, 486 U. S. 356, 362 (1988). Error in the third finding, the weighing of aggravating and mitigating circumstances, would not come within this standard, however. Once it is determined that a habeas petitioner is constitutionally eligible for the death penalty, federal habeas courts may not use the miscarriage of justice standard to reweigh the aggravating and mitigating factors.

Limiting the miscarriage of justice standard to eligibility provides the necessary objective standard. One either is or is not eligible for the death penalty. Eligibility-based attacks will be limited to two groups. First, a sentence may be attacked as unjust on the grounds that the sentencer's discretion was insufficiently limited. Either the sole statutory aggravating factor that made the murder "capital" provides insufficient guidance to the sentencer, cf. *Zant* v. *Stephens*, 462 U. S. 862, 882-884 (1983), or the petitioner may proclaim his innocence of all of those factors that made his murder capital. The second way of attacking eligibility is through the defendant's status. If, as a matter of constitutional law, defendant's status makes him ineligible for the death penalty, then he may invoke the fundamental miscarriage of justice exception. Thus, if a person is insane, *Ford*, *supra*, 477 U. S., at 408; or committed a crime not severe enough to warrant the death penalty, *Coker*, *supra*, 433 U. S., at 592; or complains of *Tison* error, *Tison*, *supra*, 481 U. S., at 157-158; or is less than 16 and the state has not specified a lower age requirement for the death penalty, see *Thompson*, *supra*, 487 U. S., at 857-858 (O'Connor, J., concurring); or is severely mentally retarded, see *Penry*, *supra*, 492 U. S., at 312, then he may claim that his death sentence is a fundamental miscarriage of justice.

Finding such errors do not place an excessive burden on the federal courts. Whether a defendant's status renders him ineligible for the death penalty involves answering the relatively simple question of whether defendant's claim fits one of the narrow exceptions to death penalty eligibility that this Court has carved out. An attack on the necessary aggravation involves similarly straightforward issues. If petitioner disputes that he committed the necessary aggravating acts, he is claiming that he is "innocent"of those particular acts. A person who cannot be sentenced to death because he did not commit the necessary aggravating acts is truly "innocent" of the death penalty.

An attack on the constitutionality of a statutory aggravating factor is also relatively straightforward and objective. The purpose behind the guidance requirement is to place an "inherent restraint on the arbitrary and capricious infliction of the death sentence." *Godfrey*, *supra*, 446 U. S., at 428. There must be a "principled way to distinguish" between the imposition of the death penalty in one case involving the suspect circumstance and the failure to impose it in another. See *id.*, at 433. While the pursuit of objectivity and precision in aggravating circumstances does not guarantee objectively decided

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8. Not every state requires these three findings to be made separately. In California, for example, the jury makes the initial finding of guilt of the underlying crime and the necessary statutory aggravating factor at the same time, except for the prior murder circumstance. See Cal. Penal Code § 190.1(a)(1). Next comes the sentencing phase where the jury weighs the aggravating and mitigating factors and decides whether death is appropriate. *Id.*, § 190.3. Nonetheless, the three findings are made.

issues, it is a step in that direction. Ascertaining whether an aggravating circumstance provides sufficient guidance is a matter of statutory interpretation, a task courts have much practice with. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947). Furthermore, the necessary interpretation is not particularly difficult. A court does not have to determine the exact meaning of a statute, it only has to know whether the statute was sufficiently precise to channel the jury's discretion to impose the death sentence. See *Cartwright*, *supra*, 486 U. S., at 363. Finally, any difficulty a federal court may have in interpreting a particular statute may be alleviated by this Court's substantial case law on the need for statutory aggravating circumstances. Cf. *Walton*, *supra*, 111 L. Ed. 2d, at 532-533; 110 S. Ct., at 3060-3061 (Scalia, J., concurring) (listing decisions of this Court on the need to channel the sentencer's discretion).

The precision and objectivity of the eligibility exception help to insure that it remains the exception and not the rule. This Court's decisions on what status makes a person ineligible for capital punishment are well-defined and easy for the states to follow. Similarly, aggravating circumstances are rarely found improper. See *ante*, at 12. Finally, any attack on the truth of a particular statutory circumstance is no more than a claim of "innocence" with respect to that circumstance. Such a claim should be as rare as the actual innocence exception. See *Carrier*, *supra*, 477 U. S., at 496.

Although narrow, the eligibility exception is not unjust. It embraces those cases where the death penalty is wrong as a matter of law. It excludes those cases where the propriety of the sentence is a matter of opinion.

The modern revolution in death penalty jurisprudence derives from this Court's decision in *Furman*. The opinions in *Furman* were motivated by three reasons for dissatisfaction with the death penalty. One reason, that capital punishment is inherently cruel and unusual, *Furman*, *supra*, 408 U. S., at 305 (Brennan, J., concurring); *id.*, at 369 (Marshall, J., concurring) has been explicitly rejected by this Court. See *Gregg*, *supra*, 428 U. S., at 187. The other two attacks on capital punishment

that the death penalty was imposed arbitrarily, see *Furman*, *supra*, at 309-310 (Stewart, J., concurring); *id.*, at 311-312 (White, J., concurring), and that it was imposed in a discriminatory manner, see *id.*, at 255-256 (Douglas, J., concurring), are dealt with at the eligibility stage of the capital punishment determination.

The requirement that a person is not eligible for the death sentence until a proper finding of statutory aggravation is made was a direct response to *Furman*'s concern with the arbitrariness of the penalty. See *ante*, at 10-12. By forcing the jury to find some particular aggravation, this requirement narrows the jury's discretion to impose the death penalty and thus avoids the arbitrariness attacked in *Furman*.

The aggravation requirement also helps address Justice Douglas' concern with discriminatory application. "Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position." *Furman*, *supra*, 408 U. S., at 255 (Douglas, J., concurring). Statutory aggravating circumstances, by channeling the jury's discretion to impose the death sentence, lessens discrimination in the death penalty. Capital punishment is reserved for the most deserving, while preventing the common murderer from being given a death sentence for discriminatory reasons. See *Gregg*, *supra*, 428 U. S., at 197-198. As the guidance requirement resolves the two legitimate complaints with capital punishment from *Furman*, there is little wonder that this right is "fundamental," see *Cartwright*, *supra*, 486 U. S., at 362, and thus within the miscarriage of justice exception to successive habeas petitions.

The status protection of the eligibility test is similarly fundamental. While rape is a serious crime, death is a "grossly disproportionate and excessive punishment . . . ." *Coker*, *supra*, 433 U. S., at 592. Giving the death sentence to the minor participant in the underlying felony in a felony murder case is similarly extreme, and thus juries have almost always refused

to impose the death penalty in such circumstances. See *Enmund* v. *Florida*, 458 U. S. 782, 795-796 (1982). Executing the insane was considered barbarous before Blackstone's time and has always been prohibited in this country. See *Ford*, *supra*, 477 U. S., at 406-409.

Along with supplying a proper standard to define a fundamental miscarriage of justice, the eligibility test also follows this Court's scant authority in this field. The interests the eligibility test protects, narrowness, objectivity, and ease of application, are the same interests protected by the miscarriage of justice standard. The miscarriage of justice exception is supposed to be invoked only rarely. "We remain confident that, for the most part, 'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.' " *Carrier*, *supra*, 477 U. S., at 495-496 (quoting *Engle*, *supra*, 456 U. S., at 135). Keeping the test for injustice narrow and objective insures that the " 'extraordinary case' " of injustice is not turned "into an all too ordinary one." *Dugger* v. *Adams*, 489 U. S. 401, 412, n. 6 (1989).

This Court has addressed the issue of fundamental miscarriage of justice in the sentencing phase of a capital case two times. In *Smith* v. *Murray*, 477 U. S. 527, 529-530 (1986), the alleged error had to do with defendant's admission of prior misconduct during a psychiatric interview arranged by his own attorney. The *Smith* Court concluded that admitting this evidence "did not serve to pervert the jury's deliberations concerning the ultimate question whether *in fact* petitioner constituted a continuing threat of society." *Id.*, at 538 (emphasis in original). Therefore, refusing to consider this procedurally defaulted claim on federal habeas corpus was not a fundamental miscarriage of justice. *Ibid.*

The intended emphasis of this statement appears to be on the jury's reaching an acceptable result based on all the information available, even though some of that information may have been illegally obtained. Cf. Friendly, *supra*, 38 U. Chi. L. Rev., at 160. It does not contradict the eligibility test. In Virginia a jury must find at least one aggravating circumstance before it may recommend a death sentence. See

Va. Code § 19.2-264.2 The alleged error in *Smith* went to the validity of one of these circumstances, whether defendant "constituted a continuing serious threat to society." See *ibid.* By finding that the testimony did not render Smith "innocent" of one of the aggravating circumstances found against him, this Court kept its analysis of the miscarriage of justice standard to the defendant's eligibility for the death penalty.

Defendant argues that if eligibility were the test for the miscarriage of justice exception, then the *Smith* Court could have dismissed the claim on the grounds that one of the aggravating grounds was valid and therefore defendant was eligible for the death penalty. Pet. Brief 21, n. 28. But one reason this Court took the case was to decide whether the Court of Appeals properly applied *Zant* v. *Stephens*, 462 U. S. 862 (1983) to the psychiatric evidence under attack *Smith*, *supra*, 477 U. S., at 528-529. The *Smith* majority did not specify what part of *Zant* it wanted to analyze. The dissent, written by the author of *Zant*, felt that the Court of Appeals improperly applied *Zant* when it upheld the death sentence in spite of one of the two aggravating circumstances being invalid. *Smith*, *supra*, 477 U. S., at 554 (Stevens, J., dissenting).

Therefore, contrary to defendant's claim in the present case, invalidating the "continuing threat" circumstance could have invalidated the death sentence in *Smith*. While a majority of the Court may have found that under *Zant* the death penalty was valid after invalidating one of the circumstances, the *Smith* majority avoided deciding this constitutional question by assuring itself that both aggravating circumstances were valid. Thus the *Smith* Court did find that Smith was eligible for the death penalty when it found his sentence was not a fundamental miscarriage of justice.

The reference in *Smith* to perverting the jury's deliberations, however, might be construed to open up any claim of procedural error in instructing the jury, selecting the jury, arguing to the jury, or admitting evidence to the jury. This interpretation was adopted by the dissent in the other case dealing with "miscarriage of justice" in the penalty phase: *Dugger* v. *Adams*, *supra*. In *Adams*, defendant was sentenced

to death for molesting and murdering an eight-year-old girl. 489 U. S., at 404, n. 2. The trial court instructed the jury that their recommendation was only advisory. *Id.*, at 440. The dissent claimed that the "alleged error is thus global in scope: it necessarily pervades the entire sentencing process." *Id.*, at 423 (Blackmun, J., dissenting).

The majority refused to adopt this process-based approach to the fundamental miscarriage of justice standard.

> "Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the 'extraordinary case,' *Carrier*, *supra*, at 496, into an all too ordinary one." *Id.*, at 411.

In *Smith*, this Court was willing to analyze error under the miscarriage of justice standard to the extent that it undermined defendant's eligibility for the death penalty. In *Adams*, process-based attacks on the accuracy of the decision to sentence defendant to death did not invoke this exception. Therefore, once a defendant is deemed eligible for the death penalty, any error unrelated to his eligibility for his sentence is not a fundamental miscarriage of justice.

At the guilt phase, innocence is the test for the fundamental miscarriage of justice. See *Carrier*, *supra*, 477 U. S., at 496. It is unjust because *everybody* believes sending an innocent person into prison is unjust. The same consensus is not present for the properly convicted capital murderer. The decision that defendant has committed sufficiently aggravated murder renders a death sentence proportionate to the crime committed. See *Pulley* v. *Harris*, 465 U. S. 37, 50 (1984). Once a person is convicted of this crime, a person can, and often times will, be sentenced to death. The overwhelming majority of Americans favor capital punishment for murder. U. S. Bureau of Justice Statistics, *Sourcebook of Criminal Justice*

Statistics — 1988, at 223. The vast majority of states have recognized this sentiment and enacted statutes providing for the death penalty for aggravated murder. U. S. Bureau of Justice Statistics, *Capital Punishment 1990*, at 1.

The extensive set of constitutional eligibility restrictions, *ante*, at 13, combined with the state statutory system, defines which murderers are death-eligible. If the defendant is *in fact* a murderer, if his crime does *in fact* fit the state's definition of a capital offense, and if neither he nor his crime *in fact* comes within any of the ineligible classes, then death is an authorized sentence which our society has determined to be not cruel and not grossly disproportionate. This detailed and exhaustive body of law, built up so painfully over so many years, has identified and excluded those cases where a death sentence would be a fundamental miscarriage of justice. The remainder of cases are those where reasonable people may differ as to whether death is the appropriate punishment. If a particularly hard-nosed sentencer could legitimately impose the sentence following an absolutely perfect trial and sentencing hearing, then that sentence is not a fundamental miscarriage of justice.

The Fifth Circuit, applying an eligibility test, properly found that defendant was eligible for the death penalty in that he did commit capital murder, and thus his sentence was not a fundamental miscarriage of justice. *Sawyer* v. *Whitley*, 945 F. 2d 812, 823-825 (CA5 1991). Giving the court of appeals eligibility finding its proper deference, cf. *Haring* v. *Prosise*, 462 U. S. 306, 314, n. 8 (1983) (findings of state law), defendant's case presents ample evidence for the justice of his sentence. The court of appeals found that defendant was guilty of aggravated arson. *Id.*, at 824-825, and n. 22. In light of the horrific circumstances of the killing, death cannot be a fundamentally unjust punishment.

II. Defendant's proposed standard is inappropriate.

Defendant wants a much broader and more subjective standard. He would call a fundamental miscarriage of justice any death sentence where the alleged error led to the admis-

sion of false evidence or the preclusion of true evidence that led to "a probability that the jury would not have imposed death." Pet. Brief 19. Defendant would attack the accuracy of the death sentence in light of the alleged errors.[9] " 'The miscarriage of justice concept permits consideration of a defaulted claim, even in the absence of a showing of 'cause' where the alleged constitutional error has resulted in a *factually inaccurate sentencing profile* . . . .' " Pet. Brief 15, n. 21 (quoting *Johnson* v. *Singletary*, 938 F. 2d 1166, 1200 (CA11 1991) (en banc) (Anderson, J., dissenting) (emphasis added)).

This standard would declare open season on the death penalty. By allowing federal courts to focus on the *accuracy* of the sentencer's decision to impose death, defendant would plunge federal courts into perpetual review of the original decision to impose death. It is a hopelessly subjective standard that will amount to no more than speculating as to what the sentencer would actually do if the alleged error had not been made. Such a standard is also too broad, allowing too many unworthy claims to be heard by federal courts. The result would be an exception that would swallow the rule against successive petitions and procedurally defaulted claims and allow federal courts to create an individualized interpretation of the Constitution for death penalty petitioners.

Defendant's first problem is with this Court's own precedents. He draws the true and false facts standards from *Smith* v. *Murray*, 477 U. S. 527, 538 (1986). This use of *Smith* makes too much out of what is at best dicta. The alleged error in *Smith* went to a statutory aggravating circumstance which

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9. Defendant also alleges that the State suppressed exculpatory evidence regarding his guilt of first degree murder. Pet. Brief 47-50. Yet this claim, if true, does not require an innocence exception. State concealment of evidence is cause under the cause and prejudice test. *Amadeo* v. *Zant*, 486 U. S. 214, 222 (1988). This demonstrates the *Carrier* Court's observation that most miscarriage of justice cases will satisfy the cause and prejudice test. *Carrier*, *supra*, 477 U. S., at 495-496. Defendant's standard, by focusing on factual accuracy in the sentencing process, is unnecessary.

determined whether defendant was *eligible* for the death penalty. See *ante*, at 20-22. Attacking the accuracy of the jury's decision has been rejected by this Court. "Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received." *Dugger* v. *Adams*, 489 U. S. 401, 412 (1989).

Defendant's standard is drawn to avoid direct conflict with *Adams*. *Adams* involved allegedly incorrect jury instructions. *Id.*, at 403. By sticking to the facts, defendant thus does not directly contradict the precise holding of *Adams*. His standard is nonetheless contrary to underlying rationale of *Adams*. Jury instructions, while not facts, can be more crucial to the accuracy of a death sentence. In *Adams*, the instruction arguably violated this Court's decision in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). *Adams*, *supra*, 489 U. S., at 402-403.[10] The jury instructions in *Adams* told the jury that it was not responsible for imposing the death sentence. Instead, it was the judiciary that bore the ultimate burden. *Id.*, at 403. In *Caldwell*, the prosecution made a similar argument to the sentencing jury. *Caldwell*, *supra*, 472 U. S., at 325-326. The *Caldwell* Court excoriated this argument for the improper influence it would have on the jury's decision to impose the death sentence. See *id.*, at 332.

The *Adams* Court chose wisely when it refused to delve into the accuracy of the death sentence. Ascertaining the effect of a piece of evidence on the accuracy of jury's discretion is always difficult. Only a mind reader can truly ascertain what effect an item of evidence would have on a verdict.

In reviewing a guilty verdict, a court has some guidelines. The admissibility and use of evidence is typically heavily regulated. Most importantly, to convict someone of a crime, a jury

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10. We say "arguably" because of differences in the Florida and Mississippi sentencing systems. See *id.*, at 403, n. 1.

has to find beyond a reasonable doubt that the accused committed the crime. *In re Winship*, 397 U. S. 358, 364 (1970).

The sentencing jury's decision in a capital case is much more subjective. There is no limit on what relevant mitigating evidence may be admitted. See *Lockett* v. *Ohio*, 438 U. S. 586, 604-605 (1978) while the state may channel the jury's discretion regarding the weighing process, see *Blystone* v. *Pennsylvania*, 108 L. Ed. 2d 255, 263, 110 S. Ct. 1078, 1082 (1990), the sentencing jury still retains considerable discretion over whether to impose the death sentence, cf. *McKoy* v. *North Carolina*, 108 L. Ed. 2d 369, 377-378, 110 S. Ct. 1227, 1230-1231 (1990) (sentencer must be allowed to give effect to all mitigating evidence). The sentencing jury is given this wide access to evidence and broad discretion in order to insure that the sentencing process is individualized to each particular defendant. See *Woodson* v. *North Carolina*, 428 U. S. 280, 304-305 (1976) (plurality).

Once the jury has found the necessary statutory aggravating circumstance, any disagreement over whether to impose the death penalty is no more than a matter of opinion. The narrowing process that goes on in order to make defendant eligible for the death penalty eliminates the truly undeserving from consideration for the death penalty. See *ante*, at 22-23. Of those defendants eligible for the death penalty, at least some people will agree that the death sentence is proper. See *ante*, at 23. Thus, when reviewing the "accuracy" of a death sentence, a federal court can do no more than second-guess the sentencing jury. It will have to reweigh the aggravating and mitigating factors itself.

In *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980), this Court condemned the imposition of the death penalty where the only statutory aggravation was that the murder was "outrageously or wantonly vile, horrible and inhuman." As the trial judge gave no instruction on the meaning of this statute, the jury's interpretation of it could "only be the subject of sheer speculation." *Id.*, at 429. The federal habeas judge reviewing the effect of new evidence on the accuracy of the sentencing jury's decision will be forced to engage in the same type of speculation. "The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. *It is not surprising that such collective judgments are often difficult to explain.*" *McCleskey* v. *Kemp*, 481 U. S. 279, 311 (1987) (emphasis added).

The *Johnson* Court noted the difficulty of this decision.

> "When a defendant is eligible for the death penalty . . . , it is nearly impossible to determine that the sentencing body's ultimate conclusion that imprisonment is more appropriate than the death penalty (or *vice versa*) is 'correct' or 'accurate' or 'incorrect' or 'inaccurate.' " *Johnson*, *supra*, 938 F. 2d, at 1183-1184.

The only alternative to speculating on whether the sentencer would have imposed death had the alleged error not been made is for the federal court to determine for itself whether a death sentence was accurate. It could take the call for accuracy to heart and decide for itself whether the defendant before it *should* be sentenced to death in light of all the aggravating and mitigating evidence. While a federal court may examine the rationality of a state jury's verdict, it cannot substitute its own judgment for that of the jury. See *Jackson* v. *Virginia*, 443 U. S. 307, 318-319 (1979).

Defendant claims federal courts are used to making this type of determination. Citing *Strickland* v. *Washington*, 466 U. S. 668 (1984), he notes that this Court has developed standards for dealing with the effect of errors on the sentencer's balancing of aggravating and mitigating factors. Pet. Brief 30-31. The standard defendant wishes to import from *Strickland* is too broad to provide an accurate definition of a fundamental miscarriage of justice. What the *Strickland* Court said was that "the question is *whether there is a reasonable probability* that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, *supra*, 466 U. S., at 695 (emphasis added).

This standard was developed for claims properly before a federal court. Hearing a successive petition should be an exception and not the rule. Defendant's test would eliminate the bar against successive petitions for claims alleging ineffective assistance of counsel involving the improper admission of or failure to submit evidence at the sentencing phase.

Such claims regarding counsel are not unusual. Federal courts are frequently presented with the claim that a death sentence was the result of ineffective assistance of counsel. See *Johnson*, *supra*, 938 F. 2d, at 1185. Attorneys cannot look into every possible line of inquiry. See *Strickland*, *supra*, 466 U. S., at 691. While error is not likely, given the fact that any relevant mitigating evidence may be submitted to the sentencer, failure to follow a particular line always could be an error. Thus most capital cases will present claims of *Strickland* error that could come within defendant's proposed standard. Adopting such a standard will only encourage the sandbagging that is the bane of federal habeas corpus. Cf. *Wainwright* v. *Sykes*, 433 U. S. 72, 89 (1977). Furthermore, defendant wants to go beyond *Strickland*. Ultimately, he wants the federal courts to assess the *accuracy* of the death sentence. Pet. Brief 15, n. 21. The *Strickland* Court only addressed the probable impact of an error on a jury's decision. It never addressed the propriety of the death sentence.

Defendant's standard, if adopted, will bring up a serious problem in those death penalties reversed as fundamental miscarriages of justice. If, on retrial, a defendant is again sentenced to death in spite of the factual errors being corrected, what will the federal habeas court do when confronted by a new habeas petition? It has already held that such a death sentence is fundamentally unjust. But if the constitutional errors have been corrected in the retrial, it has no ground to reverse the death sentence. The bar against successive petitions was meant to defuse tensions between state and federal courts not aggravate them. As the decision whether to grant mercy is inherently subjective, federal courts will have to rely on their instincts to determine how an error would influence the sentence. Thus, review of the accuracy of the individual-

ized sentencing process, cf. *Woodson*, *supra*, 428 U. S., at 304-305, will lead to an individual interpretation of the constitution unique to every federal habeas petitioner claiming a fundamental miscarriage of justice. Federal courts must be given sufficiently objective and precise standards to prevent this from happening. See *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 546, 111 S. Ct. 1454, 1471 (1991).

This Court adopted the cause and prejudice test for successive petitions in order to provide federal courts with a workable test that channels the discretion of the federal courts. *Id.*, 113 L. Ed. 2d, at 546, 111 S. Ct., at 1471. Requiring federal courts to ascertain the "accuracy" of an inherently subjective decision to impose the death sentence is at war with this principle. In order to review the accuracy of the sentence in light of a petitioner's claim of error, the habeas court will have to look at *all* the aggravating and mitigating circumstances. This cumbersome review of the record will be done each time a capital defendant files a successive petition claiming a fundamental miscarriage of justice. Thus, federal courts face the prospect of endless review of successive habeas petitions in, capital cases, each one alleging one new factual "inaccuracy" making the sentence unjust.

Capital defendants have every motive to engage in such a manipulation of habeas corpus. A typical habeas petitioner has nothing to lose in filing a successive petition. Someone on death row, however, has everything to gain by filing a petition. Each stay he receives pursuant to a pending petition allows him to frustrate the execution of his sentence. So long as he can delay execution through habeas corpus, he can "win" his case against the state. Putting federal courts in perpetual review of his sentencing hearing is one way to ensure this.

Inevitably, a reaction will set in against this abuse. Courts, to preserve their own schedules and to avoid being tools of delay, will give such claims at best cursory treatment. Justice Jackson's prophecy will then come true. The occasionally meritorious application will be "buried in a flood of worthless ones." *Brown* v. *Allen*, 344 U. S. 443, 537 (Jackson, J., concurring in the judgment).

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

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Respectfully submitted,

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